



4. Overview of Water Law Applicable to Jemez y Sangre Water Planning Region

Water management is impacted by numerous municipal, state, tribal, and federal laws that control the transfer, use, and quantity of diversions and protect water quality. A report entitled *Overview of Water Law Applicable to this Region of New Mexico* is presented in Appendix D. This report, prepared by Kery, Belin, and Utton (2001a) under the direction of the JySWPC Legal Subcommittee chaired by Peter Chestnut, provides a comprehensive summary of applicable laws. Appendix D also contains a detailed discussion of key legal issues affecting the Jemez y Sangre region (Kery, Belin, and Utton, 2001b) and an analysis of legal issues pertaining to area of origin protections and critical management areas (Kery and Utton, 2002).

4.1 Overview of Water Law

The following summary of laws and legal agreements is taken from the *Overview of Water Law Applicable to this Region of New Mexico* (Appendix D1).

4.1.1 New Mexico Water Law

New Mexico water law covers the following issues:

- Prior appropriation and beneficial use
- Administration of water rights
- Appropriation and transfer of water rights and state permitted uses
- Other state agencies addressing water rights
- Water rights adjudication
- Local and regional water planning
- Water project financing





4.1.2 Pueblo Water Rights

Pueblo water rights are important in the Jemez y Sangre region, and are independent from state allocation law, regulation, and administration. Pueblos have aboriginal rights to water that date back to the Pueblos' existence as autonomous societies and the use of their lands and waters. These rights, which include historically irrigated acreage rights, seniority against all non-Pueblo users, and rights to water in temporary catchments and water for domestic and business use result from the application of very old principles of international law dating back four or five centuries. In addition, Pueblos have federally reserved water rights where lands outside Pueblo grants have been reserved for them by the United States.

4.1.3 Federal Law

In addition to federally reserved rights for Pueblos, federal law covers reserved water rights for land set aside for specific purposes (e.g., forest and park lands). In addition, several important federal acts (e.g., the ESA, National Environmental Policy Act [NEPA], Clean Water Act [CWA], etc.) affect the exercise of water rights and availability. Water availability issues related to the ESA and NEPA are discussed in more detail under Sections 4.2.4 and 4.2.5; more on the CWA is provided in Section 4.1.7.

4.1.4 San-Juan Chama Project

The SJC Project is a federal water project built in the 1960s to transport approximately 110,000 acre-feet per year (afy) of water from the San Juan River system to the Rio Grande via the Chama River. The purpose of the project was to make water to which New Mexico is entitled under the Colorado River compacts available for use in the Rio Grande Basin, where water has been in short supply. Several entities in the Jemez y Sangre planning region have contracts for SJC water, including the City and County of Santa Fe, Los Alamos County, City of Española, San Juan Pueblo, Pojoaque Valley Irrigation District (PVID), and the USACE.





Use of the SJC project water requires an OSE permit obtained through the same permitting process as for native river flows; however, SJC water is exempt from Rio Grande Compact delivery accounting.

4.1.5 City and County Regulation of Water Use

Both cities and counties have the authority to adopt ordinances conserving and regulating the use of water within their jurisdictions. For example, subdivision and other land use approvals are increasingly being conditioned upon an adequate availability of water. Also, county and municipal regulations may be important in the regulation of domestic wells, as the OSE has set a policy that allows counties or municipalities to implement their own restrictions on the issuance of domestic well permits within their jurisdictions. Furthermore, counties and municipalities may regulate water use by assuming responsibility for supplying water to their residents; such regulation may include the imposition of conservation measures or the exercise of eminent domain powers to establish or expand water utilities.

4.1.6 Interstate Compacts

New Mexico is a party to several compacts, including the Rio Grande Compact and the Colorado River compacts. The compacts obligate upstream states to deliver specified amounts of water to downstream states. In this way, compacts can place significant constraints on the water supply available for use, except for use by the Pueblos, which are specifically exempted from the Rio Grande Compact. The Rio Grande Compact is the most significant compact within the Jemez y Sangre planning region, however, the Upper Colorado River and the Colorado River compacts are relevant in that they control the SJC Project.

4.1.7 Water Quality Law

Federal, state, and tribal laws and regulations govern water quality within the Jemez y Sangre planning region. The most significant federal law is the CWA, a federal law that sets water quality standards for specific segments of surface waters, makes it unlawful for a person to discharge pollutants into surface waters without a permit, and allows for the designation of total





maximum daily loads (TMDLs) for pollutants threatening the water quality of stream segments. Other federal laws that apply to water quality include the Safe Drinking Water Act and the Resource Conservation and Recovery Act. New Mexico has adopted its own surface water quality standards, as have a number of Pueblos within the planning region, including the Pueblos of Nambe, Pojoaque, San Juan, Santa Clara, and Tesuque.

4.2 Water Availability Issues

The following discussion is based primarily on a memorandum prepared by Kery, Belin, and Utton (2001a), under the direction of the JySWPC Legal Subcommittee, on water availability issues. A copy of this document is provided in Appendix D2.

4.2.1 Use and Regulation of Domestic Wells

The use and regulation of domestic wells is of critical importance in the consideration of water planning. Under the New Mexico Water Code, an applicant may receive a domestic well permit from the State Engineer without acquiring commensurate groundwater rights or retiring offsetting surface water rights. Because obtaining a domestic water right permit is essentially a ministerial process, it is viewed by many both as a loophole in the regulation of groundwater withdrawals and as an obstacle to the use of water supply as a growth management tool. Key issues related to domestic well use and regulation include:

- Appropriation and use of domestic water
- State Engineer prohibition of domestic wells
- Local government restrictions
- Transfer into community systems

Each of these issues is discussed at length in Appendix D.





4.2.2 Transfers Across the Otowi Gage

The State Engineer's administration of water right transfers in conformance with the Rio Grande Compact will affect the availability of water in the planning region. Under the Compact, which was agreed to by the States of New Mexico, Colorado and Texas in 1938, deliveries downstream are set under an inflow-outflow schedule. Deliveries to New Mexico from Colorado are calculated by upstream gages, and New Mexico's obligation to deliver water to the Rio Grande project at Elephant Butte Reservoir is determined by reference to the index supply at the Otowi Gage, located on the river on San Ildefonso Pueblo. Based on the quantity of flows measured at Otowi, the Compact establishes a delivery schedule of the amount of native flows that must be delivered to Texas at Elephant Butte Reservoir.

Because of the Otowi Gage's role in determining delivery amounts, the OSE has a long-standing administrative practice of not permitting a change in point of diversion from one side of the gage to the other, whether permanent or by lease. The Otowi Gage is located in the approximate middle of the Jemez y Sangre Planning Region and development of water resources has been, and is likely to continue to be, more significant below the gage than above, as reflected by a higher price for water rights in the middle valley than on the main stem in northern New Mexico. A critical question is how the administration of water right transfers within, to, or from the planning region could affect water availability.

4.2.3 Reuse of Return Flows

An important issue to municipalities, counties, and other entities that supply water and treat wastewater is the reuse of return flows to meet growing municipal demands. Such reuse will result in less water returning to the river system for use by other users and, consequently, raises questions of whether OSE approval is necessary and whether downstream users may oppose the reuse. Another type of reuse occurs when a water user seeks to increase diversions based upon the amount of return flows it makes to the river system. From a legal standpoint, a right to divert water provides its user with two types of water: the diversion portion, which equals the total amount withdrawn from the stream system, and the consumptive use portion, which is the portion that is consumed. Any amount left over that returns to the stream system by seepage,





discharge, or even injection is a return flow. Where the OSE has already issued a permit to divert a specified quantity of water, the OSE's authority over return flows is limited unless the permit specifically addresses return flows.

4.2.4 National Environmental Policy Act Process

NEPA is a federal law that addresses process, not substance. It dictates the steps that must be taken to analyze environmental impacts of actions; it does not place limits on what actions may be taken. For planning purposes within the region, it is likely that any action that either receives significant federal funding or has federal agency involvement will have to be subject to review under NEPA. For example, it is virtually certain that any construction or development of SJC water from the Rio Grande to the City will be subject to a NEPA analysis. This is because the project will likely be constructed at least partially on federal or Indian land, will probably be at least partially federally funded, and will probably need various approvals from federal agencies.

4.2.5 Endangered Species Act Compliance

Two requirements of the ESA will most directly affect water management in this region. First, federal agencies, in consultation with the U.S. Fish and Wildlife Service, must ensure that their actions do not jeopardize the continued existence of endangered species or destroy or harm habitat that has been listed as "critical" for such species. The second is the ESA prohibition against the unlawful killing, harming, harassing, or taking of other detrimental action against a listed species unless an incidental take permit or statement has first been obtained from the Fish and Wildlife Service.

The Rio Grande silvery minnow is the only aquatic species on the federal endangered species list that exists in waters that might be affected by actions taken within the Jemez y Sangre Water Planning Region (Section 4.1.3). Other listed species such as the Southwestern willow flycatcher could be affected by water planning actions, but it is unlikely that large-scale water management or planning actions will significantly affect the existence of these species. Additional species that may be listed in the future could affect water management in this region, but such listing actions cannot be predicted at this time. The protection of the silvery minnow,





an endangered species, has the potential to affect regional water planning and the allocation of water from the SJC Project (Section 4.2.4). In November 1999, several environmental groups collectively filed a lawsuit against the Bureau of Reclamation and the USACE regarding the endangered Rio Grande silvery minnow. A later Motion for Preliminary Injunction filed by these groups asked the District Court to direct the Bureau of Reclamation and the USACE to maintain a continuous flow of water in the Rio Grande from Cochiti Dam south for approximately 160 miles to the headwaters of Elephant Butte Reservoir. In August 2002, U.S. District Court Judge James A. Parker ruled that the Bureau of Reclamation must release water held in storage in Heron Reservoir (just north of the Jemez y Sangre planning region) to maintain minimum flows for the silvery minnow. Judge Parker's decision was stayed by the federal 10th Circuit Court of Appeals, therefore delaying implementation of the decision. Furthermore, rains in September and October 2002 alleviated the need to release the water, but releases of SJC water in the future for instream flow may reduce water available to cities and municipalities in the planning region.

